Office - Supreme Court, U.S.
FILED
MAR 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief.

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Petitioners' Reply Brief.

Statement of the Facts and Prior Proceedings — Again.

Both respondents were apparently dissatisfied with petitioners' statement of the case, and, as is their right, Rule 34.2, submitted their own statements of the case. We suggest, however, that the briefs of both respondents contain numerous misstatements of the record, allegations *dehors* the record, and assertions contradicted by the record. Some of these have been the subject of prior discussion by petitioners and some will be analyzed in argument, but others deserve comment at this point.

The Department's brief states at pp. 10-11: "The factual dispute centers around the origin and nature of his [Michael Panico's] learning disability and the appropriate educational placement to meet his individual needs". The first part of this statement, echoed at pp. 5-6 of the Panicos' brief, was never correct. See Argument I, *infra*. Petitioners have, at least since Michael was in the second grade, considered him to have a learning disability (J.A. 42, 198-199; R.A. III, p. 421), and both the hearing officer and the District Court concurred (Pet. A. 3a, 15a, 60a). Although, as the District Court noted, "the precise nature or origin of his difficulty is in dispute" (Pet. A. 60a), the experts were also "in substantial agreement as to the manner in which Michael should be helped" (Pet. A. 61a). Any factual dispute concerning the nature and origin of Michael's dyslexia is peripheral rather than central to this case.

The second part of the statement quoted from pp. 10-11 of the Department's brief was once true but no longer is. At trial in the District Court, petitioners took the position that Pine Glen had offered Michael a free appropriate public education in the least restrictive placement, a position that respondents would have been expected to oppose. Yet, curiously, at the trial neither respondent presented a scintilla of evidence, apart from the hearing officer's decision, that placement at the Carroll School was superior. The District Court found in favor of the Pine Glen placement (Pet. A. 61a, 66a). The Court of Appeals reversed the District Court's decision primarily on the ground that the District Court did not properly evaluate the seriousness of past "procedural" violations which had led the hearing officer to decide in favor of the Carroll School placement. See Petitioners' Bf., pp. 21-22, 29-33, 51-52. The central factual dispute, as the First Circuit conceived it, is whether the "violations" are serious enough to impose upon petitioners the duty of paying damages to the Panicos in the form of tuition and related expenses for Michael's education at the Carroll School.

At page 16 the Department's brief states:

> The school agreed to have Dr. Lott, the pediatric neurologist from Massachusetts General Hospital who had previously tested Michael, coordinate the psychological testing necessary for the preparation of the IEP. J.A. 5. Nevertheless, when the IEP for Michael's fourth grade was prepared in the early summer of 1979, it was without the benefit of Dr. Lott's latest test results. J.A. 204, 330-31.

Although Dr. Lott had met with the parents the week following May 25, 1979 to coordinate the testing, the test results, which were to be shared with Burlington in order to prepare the IEP (R.A. III, pp. 391, 394; J.A. 201-204), were not forwarded until after Mr. Panico demanded the IEP on June 27th. It was the Panicos, not petitioners, who sought to have the IEP prepared without Dr. Lott's test results. The very pages of the Joint Appendix cited by the Department bear this out. At page 204, Mrs. Arin, petitioners' Core Evaluation Administrator (J.A. 190), testified that on June 26, 1979, Mr. Panico called, demanding the Educational Plan and stating that it was already ten days overdue and "he was planning to reject it anyway."

At pages 330-331 Mr. Panico testified as follows:

> Q. Now, between June 4th and June 28th or 9th, did you have any further conversations with Mrs. Arin regarding Michael or the preparation of the plan?
>
> . . . .
>
> On June 27th, I called Jean Arin's office and demanded the plan. . . . I told her that I wanted the plan, I had to have it. And she said she was sorry, that it wasn't ready. . . .
>
> And we then — we talked for a few minutes. I told her I wanted the plan because I was contemplating appealing if she was going to insist that Michael stay in John McAleer's classroom for the upcoming year.

In other words, Mr. Panico had already decided by June 27th to reject the IEP, and any failure of the IEP to reflect Dr. Lott's input was, contrary to the implications given by the hearing officer (Pet. A. 19a), inconsequential. Dr. Lott's report was written on July 10, 1979 (Dept. E p. 18), one week after the IEP was rejected by the pare. (J.A. 18), and it came to petitioners on July 26, 1979 (R.A. IV, pp. 179-180).

Footnote 17 at p. 27 of the Department's brief asserts: "No IEPs have been prepared for Michael since the judicial proceedings began in 1980. Although Burlington has claimed repeatedly that the parents improperly refused to make Michael available for evaluations during the course of the litigation, the parents have denied this . . . ." See also Panicos' Bf., p. 28, n.10. The parents have never denied petitioners' assertions. When petitioners moved in the District Court for summary judgment on the basis of written evidence of the refusal (J.A. 181-185, 189), the Panicos filed no counter-affidavits and did not otherwise controvert what their attorney had said in writing. In denying summary judgment, the District Court appeared to accept the uncontroverted allegations of fact with respect to making Michael and his records available in an appropriate manner for the drawing of a new IEP (Pet. A. 49a), as indeed it should have, but deemed the evidence irrelevant (Pet. A. 55a-56a).

The Panicos' brief asserts at page 14: "On June 28, 1979, Burlington produced an IEP. The plan, which described Michael's problems as stemming from 'negative attitudes and depression,' proposed to transfer Michael to Mr. McAleer's class at the Pine Glen School." The IEP contains no such statement. The only statement on this subject in the IEP says almost exactly the opposite (J.A. 9):

> Michael has a positive self image regarding his body and competence in sports activities. However, Michael perceives that adult and peer expectations for academic performance are beyond his reach. The perceived negative

> attitudes concerning academic competence, contribute to his questioning his self worth and cause him to become anxious, sad and angry.

The Panicos' brief states at p. 16:

> In early August, Mr. Panico also made contingency plans to enroll Michael in the Carroll School. On August 10, 1979, he made a deposit of $200 to secure a place for Michael (R.A. IV, 434). Only when it became clear in late August that mediation had failed and that the administrative hearing would not begin until late September did the Panicos actually enroll Michael at the Carroll School.

Nothing in the record supports the allegation of the first sentence, and the last sentence is contradicted by a letter from Massachusetts General Hospital, dated June 27, 1979, and introduced by the parents at the administrative hearing (R.A. IV, p. 360), stating: "Mr. Panico is not in a financial position to fund tuition at Carroll School but is committed to enrolling him there, should this be in Mike's best interest." If the Panicos mean no more than that they had hoped during the summer of 1979 that the Town of Burlington would agree or would be ordered to fund Michael's tuition in the Carroll School before the start of the school year, the point is hardly worth making. If the point of the quoted paragraph is that the Panicos maintained during the summer of 1979 an open mind concerning the possibility that the proposed placement in the Carroll School was inappropriate, virtually every bit of the evidence refutes it. See pp. 3-4, *supra*; Petitioners' Bf., p. 25, n.14.

Finally, at pp. 70-71, n.21 the Panicos' brief states:

> Petitioner has correctly pointed out that learning disabilities are difficult to remedy (Brief at 39). Petitioner's argument that it makes no difference what educational placement is offered a child with learning difficulties, or when such a placement is offered, is contrary to the basic propositions on which the act was founded.

Petitioners have never argued the nonsensical position attributed to them in the second sentence quoted above. What petitioners have pointed out at p. 40 and in n.37 of their original brief is that neither in this action nor in the general literature is there any indication that expensive private education leads to more effective remediation of learning disabilities than does remediation in a public school setting such as Pine Glen.

Argument.

I. The Repeated Misstatements in Both Respondents' Briefs that the Burlington School Authorities had Misdiagnosed Michael Panico as Suffering from a *Primary* Emotional Problem Amply Prove the Wisdom of Construing Title 20 U.S.C. § 1415(e)(3) as Petitioners have Argued it Should be Construed.

The brief filed on behalf on respondent Department of Education contains the following statement on pp. 11-12:

> Michael attended the Memorial School, a public school in Burlington, Massachusetts, from kindergarten through the third grade. As early as the first grade, the parents and the school disagreed about the source of Michael's learning problems. Burlington believed them to be primarily the result of emotional problems. . . . J.A. 38-39.

There is absolutely nothing at pp. 38-39 of the Joint Appendix to substantiate the quoted position of the Department. Taking the statement of Mr. Panico found on those pages as true for purposes of discussion, we note that it says no more than that Michael's first grade teacher considered him immature. Immaturity is by no means to be equated with an emotional problem, especially in a child of six. Thus, there is simply no

reason to suppose that Mrs. Reber, Michael's first grade teacher, believed that Michael suffered from some emotional disability, and indeed her testimony in the District Court totally belies any such belief. See R.A. II, pp. 26-36.

At no time did petitioners ever believe that Michael suffered from a primary emotional problem. The report of Mr. Cavanaugh, the school psychologist, was read to Mr. Panico (J.A. 92); it contains no such statement (R.A. IV, pp. 129-130). The effort to foist on petitioners the position that Michael suffered from a primary emotional problem sounds through the briefs of both respondents as a recurring theme.[1] See Panicos' Bf., pp. 5-6, 12-13, 14-15, 62; Dept. Bf., pp. 12, 15-17, 19-20, 88-90. Why is it so important for respondents to attempt to give this court the impression that the Burlington School Department believed in the spring of 1979 or at any other time that Michael's problems were primarily emotional? The answer to this question is relatively simple. Mr. Panico at various times gave numerous reasons for having rejected the 1979-1980 IEP.[2] Probably, however, his most cogent

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[1]Sometimes the theme is played subtly. At p. 14 the Panicos' brief states: "The Panicos soon learned this class [Mr. McAleer's] was generally referred to in the Burlington school system as the 'primary adjustment class.' (Pet. A. 7a)." No such statement is found at Pet. A. 7a (a page from the hearing officer's report). In fact, what the hearing officer does state at p. 7a is: "Mr. Foley agreed that in prior years Mr. McAleer's class has been called the 'primary adjustment class.' This was no longer true, he said."

[2]Mr. Panico gave the following reasons for rejecting the IEP.

BSEA TESTIMONY:

Michael didn't belong in a class for emotional children and Mrs. Black said the class would be detrimental (J.A. 105). Meade and Mason were not present at the June 4th meeting (J.A. 106). Becky Silverstein and the parents had no input as to the educational plan (J.A. 106, 153). The plan was not signed and Burlington had changed Michael's program in the past (J.A. 106). The Plan was not reflective of Michael (J.A. 106-107, 141-152). There was no provision in the plan for counselling (J.A. 107). The IEP had nothing addressing a learning disability (J.A. 107). The Ed. Plan called for a primary adjustment class (J.A. 107). There was no provision for integrating him even for math, when Michael was at grade level or above (J.A. 108, 111). Mrs. Hennessy's, Ms. Meade's and Ms. Mason's statements were in conflict with pp. 4-5 of the IEP (J.A.

reason was his opinion (a) that Mr. McAleer's class was for severely emotionally disturbed children and (b) Michael was not in the spring of 1979 or, presumably, at any other time severely emotionally disturbed (J.A. 47, 105, 332, 335). Unfortunately for Mr. Panico, the evidence shows him to be

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108). Memory problems were not addressed (J.A. 109). The IEP did not "spell out" a way to help Michael with his reading problems (J.A. 109). The Plan was not adequate or appropriate (J.A. 112). Michael did not want it (J.A. 112-113, 131). In 1977 Burlington did not prepare an IEP (J.A. 113). Michael's program was changed and he regressed (J.A. 113). Burlington ruined Michael (J.A. 113). Sally Smith, author of No Easy Answers told him that Mr. McAleer's class would kill Michael (J.A. 114). The Education Plan did not have a "measurement factor" to gauge Michael's progress (J.A. 114).

AT TRIAL (DIRECT EXAMINATION):

The primary reason was that the IEP was for an emotionally disturbed child (J.A. 332). The doctors and Mrs. Black advised against it (J.A. 332, 335). The IEP did not do anything to address Michael's reading problems (J.A. 332, 333, 335). It had good objectives, but were the same as the previous plan that had failed (J.A. 332). The IEP did not say how the reading objectives would be accomplished (J.A. 332). One-to-one tutorial was not specified (J.A. 332). Michael couldn't function with seven different children with emotional problems (J.A. 337). The school had cut his reading program (J.A. 333). Parents were not notified of testing (J.A. 333). The plan was not signed (J.A. 333). The plan did not describe his son (J.A. 333-335). There were no special teachers mentioned in the plan (J.A. 335).

CROSS EXAMINATION:

He had no more faith in the town after the violations, after it cut the time with Mrs. Black, after it ignored the diagnosis of dyslexia (J.A. 369). The principal had not signed the plan (J.A. 369, 370). The plan was thrown together in one day because it was late (J.A. 369). Mrs. Black said the class would destroy Michael (J.A. 371-372). The plan did not explain how the skills would be taught (J.A. 373). The plan was for an emotional child (J.A. 373-374). Dr. Lott advised against the school placement (J.A. 376).

It is interesting to note that where Panico purported to quote statements made to him by persons who testified at the BSEA hearing or in the District Court, their testimony does not reflect these allegations; *e.g.*, Mrs. Black never testified that she told Panico that placement in Mr. McAleer's class would "kill Michael" or gave any testimony to that effect even though she was his witness at the BSEA hearing. Panico knew, no doubt, that had he attributed such a statement to her, she would have been cross-examined with respect to it (see J.A. 353). Dr. Lott never testified that he advised the Panicos to reject the IEP (R.A. III, pp. 72-102), which Panico apparently never even showed to him; Dr. Lott saw the IEP for the first time at the BSEA hearing (R.A. III, pp. 90-92).

wrong on both points, and, with more truth than charity it can be said that Mr. Panico "fell over himself" as a witness in the District Court attempting to deny that his son had severe emotional problems in the spring of 1979 (J.A. 354-359, 365-367; compare J.A. 132-133). This is not to say that Michael's problems were primarily emotional. A learning disability may well generate emotional problems by its very nature. Not being able to do as well as other children in a basic activity is unquestionably frustrating for a child like Michael, who is above average in intelligence. Emotional problems often lead to behavioral problems, and indeed Michael was a behavioral problem both in his third grade at Memorial School (R.A. IV, p. 143) and in the following years at the Carroll School (R.A. II, pp. 4-51, 4-55 to 4-58; R.A. I, p. 228).

But the IEP that was drawn up in June of 1979 stressed primarily academic objectives in reading (J.A. 12, 14, 16; Pet. A. 7a). Mr. Panico was not correct in believing that Mr. McAleer's class was for the emotionally disturbed. Mr. McAleer had seven children in his class in 1979-80 (R.A. III, p. 500). One of those children apparently had a primary emotional disability; for another child there were simultaneous educational objectives of teaching appropriate behavior and raising reading level (R.A. III, pp. 500-501). The latter child had been fully mainstreamed by the beginning of November, 1979 (R.A. III, p. 501). The primary disabilities of the other five children were in the areas of reading and mathematics (R.A. III, p. 500); their problems were basically academic not basically emotional (R.A. III, p. 485). To quote Mr. McAleer's own words (J.A. 227):

> Q. Mr. McAleer, was yours a classroom devoted to children who had Special Education needs?
> A. Yes.
> Q. What were these needs, please?
> A. The needs were basically those of both academic and somewhat social and behavioral. Academic, they were

behind grade level. Social, ranged from a variety of situations.

There is simply no doubt that in the spring of 1979 Michael fitted into both aspects of Mr. McAleer's class.

Respondents undoubtedly recognize that if the most compelling reason given by Mr. Panico for rejecting the IEP and enrolling Michael in the Carroll School falls apart under careful scrutiny, he would almost certainly not be entitled to reimbursement of the tuition and related expenses incurred in educating Michael at the Carroll School. This recognition is probably what impels respondents to argue repeatedly that this was a case of misdiagnosis or missed diagnosis on the part of the Burlington Public Schools, which (according to respondents) simply assumed, wrongly, that Michael's problems were primarily emotional. That the Panicos were unable to convince the Hearing Officer (Pet. A. 7a, 19a), the District Court (Pet. A. 60a-61a), or the Court of Appeals (Pet. A. 119a) that this was the conflict in this case does not seem to deter them or the Department from attempting to portray it in this light. That portrayal is obviously aimed at avoiding the issue of whether the 1979-1980 IEP was appropriate.[3]

Now, what is the larger significance of the fact that Mr. Panico rejected an IEP and chose for Michael an expensive

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[3] Of course, even if Michael had not been emotionally disturbed in the spring of 1979 and even if Mr. McAleer's class had been primarily for emotionally disturbed children, it would not necessarily follow that the placement in Mr. McAleer's class was erroneous. See *Anderson* v. *Thompson*, 658 F.2d 1205, 1208 (7th Cir. 1981) (*semble*, placement of child who was not mentally retarded in class for mentally retarded was not necessarily improper placement). The opinion of the Court of Appeals does refer to the failure of the District Court to resolve certain conflicts in diagnoses (Pet. A. 119a), but the conflict was not between an emotional and a neurological problem but whether Michael's primary problem was attention deficit disorder or some other neurological problem (Pet. A. 119a). As explained on pp. 20-21 of petitioners' brief, there was no error in the failure of the District Court to resolve whatever differences there were in the diagnoses of the experts.

private school for totally inappropriate reasons? Both respondents argue at length in their respective briefs that § 1415(e)(3) should not be construed to mean what it says. Panicos' Bf., pp. 57-80; Dept. Bf., pp. 71-94. Compare *Mills Music, Inc.* v. *Snyder*, 105 S.Ct. 638, 645 (1985). Indeed, the Panicos appear to take the extreme position that (e)(3) should be read as a limitation only on the right of school authorities to change the placement of a child during the pendency of proceedings (Panicos' Bf., pp. 69-80, 83-88). Under their construction, (e)(3), which states that "unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement . . ." would be judicially reworded to say "unless the parents decide otherwise, the child shall remain in the then current educational placement . . .." While the construction of a Federal statute could hardly turn on the facts of one case, one would expect to find something in this case to indicate that the Panicos had, at least from an educational standpoint, made the "right" decision when they placed Michael in the Carroll School. As petitioners' original brief pointed out and as the District Court found, such evidence is lacking (Petitioners' Bf., p. 40; Pet. A. 61a). And when the evidence is examined in detail, it turns out that not only did they make a wrong decision but also that they made it on the basis of misinformation. In the absence of any basis to believe that other parents who do as the Panicos did make better choices or at least have better reasons to support their choices, it would be a serious mistake to rewrite the language of Congress to accommodate the Panicos or parents similarly situated.

II. Nothing in the Federal Regulations Supports the Position that Appropriate Relief under 20 U.S.C. § 1415(e)(2) Includes Damages by Way of Reimbursement of Tuition.

The Department argues in its brief at p. 53, n.34:

> This interpretation [that the District Court may award damages] is further supported by the regulations promulgated by the United States Department of Education implementing the EHA. These regulations . . . provide that the "due process procedures" available to parents, which include an administrative hearing and judicial review, will be used to resolve the question of financial responsibility for a private school placement. 34 C.F.R. § 300.403.

The text, however, of the regulation supports petitioners' position, not respondents'. Section 300.403(a) makes it clear that the District Court was correct and the Court of Appeals in error in ruling on the right to reimbursement of private school tuition. The correct rule is that there is no reimbursement of tuition when the IEP offers a free appropriate public education, no matter what transpired between the parents and the local (or State) educational agency before the IEP was drawn. See Petitioners' Bf., pp. 29-33, 51-52.

The Department presumably is seizing upon the language in § 300.403(b) concerning "financial responsibility." But that language cannot be read out of context; § 300.403(b) states:

> Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.

Sections 300.500-300.514 do not address the District Court procedures except to point out their availability. They address

only the administrative procedures. Moreover, nothing in § 300.403(b) suggests that "financial responsibility" thereunder may be retroactively considered. Section 300.403(b), properly construed, stands for no more than the proposition that, subject to judicial review, a hearing officer's decision may determine *in futuro* responsibility for paying for aspects of a particular placement.

III. If, as Respondents Argue, the Source of § 1415(e)(3) is Found in Language Used by Federal Courts in Pennsylvania and the District of Columbia, Comparison of that Language with the Language of (e)(3) Supports Petitioners', Not Respondents', Positions.

Both respondents, citing *Board of Education* v. *Rowley*, 458 U.S. 176, 192 (1982), argue that § 1415(e)(3) derives from specific language used in the consent judgments in *Pennsylvania Association of Retarded Children* v. *Pennsylvania ("PARC")*, 343 F.Supp. 279, 303 (E.D. Pa. 1972) and *Mills* v. *Board of Education of District of Columbia*, 348 F.Supp. 866, 883 (D.D.C. 1972) and that (e)(3), therefore, should not receive any construction that would limit the right of parents to place handicapped children in private schools since in these cases no such construction was intended. Dept. Bf., pp. 83-86; Panicos' Bf., pp. 71-78. That the language in these cases is far from identical and that in *Mills* it was used in relation to changes of placement pending resolution of disciplinary charges, 348 F.Supp. at 880, 883, does not seem to give either respondent pause.

In any event, though the assumption that (e)(3) derives from *Mills* and *PARC* may be well-founded, the inference that respondents attempt to draw from that assumption is not. Congress, when it drafted (e)(3) made significant changes from the (supposedly) protypical language found in these decisions. Specifically, it required the agreement of the parents (or guardian) *and* the local (or State) educational authority before the child's

placement could be changed during the pendency of proceedings under 20 U.S.C. § 1415. The usual rule is that when language used in a bill is changed in the legislative process or language used in a statute is changed by amendment, the change is assumed to be meaningful and the statute will not be read as though the change had not taken place. *United States* v. *McClure*, 305 U.S. 472, 477-478 (1939) (amendment of statute); *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (change of bill in committee). There is no reason to reach a different result when the language of an act is derived from another source such as a judicial opinion but is significantly changed by Congress.

IV. Whether Payment of Tuition is Appropriate Relief when an IEP is Found To be Inadequate is an Irrelevant Issue in this Case, or, if Relevant, Should be Decided Adversely to Respondents.

A point argued repeatedly in both respondents' briefs and the brief of the *amici* is that if EHA is to function as Congress intended, the District Court must have power to award reimbursement of tuition under 20 U.S.C. § 1415(e)(2) and, concomitantly, § 1415(e)(3) cannot bar an interim change of placement by the parents. Dept. Bf., pp. 42-63, 87-90; Panicos' Bf., pp. 39-44, 64-80; *Amici* Bf., pp. 3-33, 33-39, 40-57. This is a point that the Court ought not to reach in this case, or if it does reach it, should decide adversely to respondents.

A. *Where It Is Clear That Petitioners' 1979-1980 IEP Would Have Afforded Michael a Free, Appropriate Public Education, It Is Unnecessary to Decide what Relief Could Be Afforded In Other Circumstances.*

Both respondents persistently argue as though petitioners' IEP and the Pine Glen placement were inappropriate (Panicos' Bf., pp. 41-51, 52-55, 62, 77, 79-80, 89-91; Dept. Bf., pp. 36-38, 39-41, 42, 47-48, 53-63, 68, 87-93). Neither respondents nor *amici* seem to have understood an important thrust of petitioners' argument; certainly they have not met it. That is, where petitioners prepared and were prepared to implement an IEP that would have afforded Michael a free, appropriate public education, neither the District Court nor the hearing officer could award damages based on petitioners' alleged past "procedural violations." Petitioners' Bf., pp. 29-33, 47-48, 51. The Panicos' brief at p. 51, appears to concede "that tuition reimbursement may be denied where a school district has provided an adequate program." See also Dept. Bf., p. 56.

In deciding that petitioners' IEP was appropriate, the District Court did not, in the words of *Rowley*, 458 U.S. at 206, "substitute [its] own notions of sound educational policy for those of the school authorities . . .." Instead, it did no more than disregard immaterial aspects of the hearing officer's decision such as whether petitioners had in the past zealously accorded Michael all procedural and substantive rights (compare Pet. A. 13a with Pet. A. 60a), whether Michael worked well in small groups free from distraction (Pet. A. 14a),[4] whether Michael needed experienced teachers (Pet. A. 14a),[5] and whether Michael needed to continue with Orton-Gillingham (Pet. A. 14a).[6] It took into account Federal requirements for a

[4] Immaterial since there were five or six students in Michael's classes at the Carroll School and seven students in the proposed class at Pine Glen School (R.A. II, p. 4-40; R.A. III, p. 485). There were few distractions at Pine Glen (J.A. 228-230, 241-242, 245).

[5] Immaterial since Mr. McAleer was at least as experienced as Michael's Carroll School teacher (J.A. 225; Compare R.A. II, pp. 4-36 to 4-40).

[6] Immaterial since a form of Orton-Gillingham was used at Pine Glen though it was more flexible (Pet. A. 61a).

least restrictive placement with opportunities for mainstreaming (Pet. A. 66a). Unless, therefore, as the First Circuit held, damages are to be awarded for past violations, the issue of whether the District Court could award damages by way of reimbursement when there has been a failure to prepare an appropriate IEP is in this case moot.

It is a fundamental principle of our jurisprudence that courts should not decide issues unnecessarily. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 432 (1948); *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100, 101 (1973) *reh. den.* 414 U.S. 1138 (1974). In *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 29-30 (1981) *same case* 104 S.Ct. 900, 921 (1984) this Court has twice explicitly refused to decide whether Federal law creates a private cause of action for damages on the part of retarded citizens. The Court declined to reach the issue even though it was squarely presented on the facts. In the present case where the IEP was properly judged to be appropriate, the issue of whether damages may be awarded when an inappropriate IEP is drawn is not presented.

B. *If the Court Should Reach the Issue, a Reviewing Court Can Order Appropriate Relief Under 20 U.S.C. § 1415 (e)(2) Without Awarding Retroactive Tuition.*

The above issue is, in the briefs of respondents and *amici*, confused with a separate one: whether tuition payments may be awarded *prospectively* when a court finds an IEP to be inappropriate. See Dept. Bf., pp. 42-71; Panicos' Bf., pp. 39-56; *Amici* Bf., pp. 40-57. The latter issue is simply not presented in this action. One reason for its absence is the absence of any IEP for years beyond 1979-1980. See Petitioners' Bf., pp. 35-36. A second is that by the time this action was tried, the 1979-1980 IEP had long expired. See J.A. 3, 7. A third, of course, is that the IEP was found appropriate. However if an IEP is found to be inappropriate, it will not necessarily or

even often follow that a prospective award must include a direction to pay private school tuition. See, *e.g.*, *Irving Independent School Dist.* v. *Tatro*, 104 S.Ct. 3371, 3375 (1984) (IEP modified by Court to provide that child receive catheterization service in public school).[7] Even in cases in which a court concludes that the IEP was inappropriate and that the local (or State) educational agency has no program that will avoid private school tuition, the court can state its decision and remand to the appropriate administrative agency for further proceedings consistent therewith. This is certainly the usual procedure by which Federal courts deal with harmful error when they review the decisions of Federal agencies. See *National Labor Relations Bd.* v. *Food Store Employees Union*, 417 U.S. 1, 9-10 (1974). It is not to be lightly inferred that educational agencies will ignore such a remand or that, if they do, the Department of Education will not invoke sanctions. See 20 U.S.C. § 1416(a).

If, however, a court may, under § 1415(e)(2) issue a judgment that requires the funding of tuition *in futuro*, such a judgment is, unlike a retroactive judgment, truly in the nature of equitable relief. As was said in *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 627 (1950): "But . . . 'equity will administer such relief as the exigencies of the case demand at the close of the trial.' *Bloomquist* v. *Farson*, 222 N.Y. 375, 380." Likewise, a preliminary injunction, see Petitioners' Bf., pp. 49-51, speaks to the future.

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[7] The Panicos' argue that this Court's affirmance in *Tatro* implies affirmance of the District Court decision in that case granting reimbursement. *Tatro* v. *Texas*, 516 F.Supp. 968, 978 (N.D. Tex. 1981). Panicos' Bf., pp. 46-48. Even the decision of the Fifth Circuit in *Tatro* did not discuss the right to reimbursement, 703 F.2d 823 (1983). Nor does the opinion of this Court. A judicial decision is not to be read as authority on a point not discussed. *Cf. United States* v. *Neifert-White Co.*, 390 U.S. 228, 231 (1968). This is true even when the point was discussed in a decision of a lower court in the same case and the lower court's decision is affirmed on appeal, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976), and particularly true of a case like *Tatro* that is before the court on certiorari and, thus, normally, considered only on the issues as to which certiorari is granted. Stern, Gressman, SUPREME COURT PRACTICE (5th ed.), p. 361 (1978).

When, however, a court orders retroactive funding of tuition, it is not awarding "an element of *equitable* relief traditionally used by the courts." *Amici* Bf., p. 46 (emphasis in original). Although, to be sure, courts of equity do grant relief by way of damages under the maxim, "Equity delights to do justice and not by halves," see *Rozelle* v. *Connecticut Gen. Life Ins. Co.*, 471 F.2d 29, 31 (10th Cir. 1972) *cert. den.* 411 U.S. 921 (1973): such relief is granted merely to avoid a multiplicity of actions. Walsh on Equity, p. 107 (1930). See *Angoff* v. *Goldfine*, 270 F.2d 185, 190-191 (1st Cir. 1959). It is never awarded where damages would not be recoverable at law or by statute. *Codman* v. *Wills*, 331 Mass. 154, 159 (1954). See *United Railroads of San Francisco* v. *San Francisco*, 249 U.S. 517, 521-522 (1919). For reasons stated in Petitioners' Bf., at pp. 20-26, damages are no part of the award contemplated by EHA.

An argument repeatedly advanced is that if a court cannot award retroactive damages in a (e)(2) case, the passage of time between rejection of an IEP and a final adjudication will make any other action that a court may take inefficacious. Dept. Bf., pp. 53-54, 60, 63, 88-91; Panicos' Bf., pp. 41-42, 43, 56, 78-80, 86, 89-91; *Amici* Bf., pp. 31-33, 50-55. All three briefs point to the six-year period that will probably have elapsed between the rejection of the IEP and the mandate of this Court and ask this Court to assume that this is the normal period in EHA cases. Petitioners point out, however, that even though this case occasioned three appeals to the First Circuit between entry and trial, and even though some delay was occasioned by both respondents' changes of counsel, see D.Ct. Docket Entries 241, 242, 258, 261, 262, trial was actually completed within three years of the rejection of the IEP. Other cases should go through the courts more rapidly.

However that may be, few cases in which there is judicial review are, as Congress must have been aware when it enacted (e)(3), likely to be over before a planned placement takes effect. Local or State educational agencies may at any time

agree with the parents on a new placement while proceedings are pending, and one may assume that in many, but not necessarily all, cases where, as here, the parents prevail at the BSEA level, the State agency will, if it has appropriate machinery in place, see Petitioners' Bf., n.41 at p. 44, agree to interim placement in the placement approved by the hearing officer. If the parents do not prevail or if they do but can obtain no agreement as to interim placement under (e)(3), a court may, conceivably, grant preliminary relief if it is convinced that the child is suffering irreparable harm. See Petitioners' Bf., pp. 49-51. In most cases, however, in the absence of an agreement for interim change of placement, the child should under (e)(3) remain in his then current placement while administrative and judicial proceedings are pending. Where sufficient opportunities exist to convince local and State educational authorities or a court that an interim change of placement is required, courts do not have to be given the power to order reimbursement of tuition to make EHA effective.[8]

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[8] At page 45, n.12, the Panicos cited numerous cases that supposedly support their position as the prevailing view. A review of the cases proves the extravagance of their claim. Thus, in *Gary A.* v. *New Trier High School Dist. No. 203*, 1983-1984, EHLR DEC. 555: 376, 381 (N.D. Ill. 1984), the court observed that "when the relief sought under the EAHCA stems from a dispute over the appropriate substantive content of a child's education, or the proper placement in a particular environment, recourse is limited. Neither reimbursement damages, injunctive compensatory relief, or even the prospective injunction placement change sought in *Rowley* is available." In *Hall* v. *Vance*, 1983-84 EHLR DEC. 555:437, 442 (E.D.N.C. 1983) the following language appears: "Where the local educational agency meets the statutory requirements, the duty created by *Stemple* [v. *Board of Education*, 623 F.2d 893] falls into place . . . the duty to keep the child in the current educational placement attaches upon identification." *Id.* at 443 one finds this statement: "[W]here the parents take unilateral action in the face of the vast procedures designed to ensure an appropriate education, any right to reimbursement is waived." Ultimately these cases, on the facts of the present case, do not support respondents' position. At p. 49, n.14 of the Panicos' brief *Hall* v. *Vance* is cited for having "facts strikingly similar" to the present case. On the contrary, the District Court in that case found the following: that for many years there was no compliance with the procedural requirements of EHA by the local educational agency and James Hall's case was not an isolated incident; that the failures of the local

Conclusion.

For the reasons given herein and in petitioners' original brief, the judgment should be reversed and the case remanded to the Court of Appeals with instructions to order the parents to reimburse petitioners as required by the judgment of the District Court.

Respectfully submitted,

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agency were egregious and thus constituted bad faith; that the previous IEP's did not provide an education reasonably calculated to enable the plaintiff to receive educational benefits; and that in fact the prospective IEP under all the circumstances was similarly inadequate. Indeed, in none of the cases cited in n.12 was an IEP rejected by the parents found to be adequate after a trial in the district court.